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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, *Petitioners*,

v.

JOSEPH P. MOODY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER, HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO

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OPINIONS BELOW

The opinion of the court of appeals (A. 511-537) is reported at 474 F.2d 134. The opinion and order of the district court (A. 473-507), entered November 9, 1971, is reported at 4 FEP Cases 561.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1973. Petitioner's timely petition for rehearing with suggestion for rehearing in banc was

ultimately denied on July 22, 1974 (A. 548).[1] The order of the court of appeals directing that its mandate be stayed for a period not to exceed thirty days, pending the filing of applications to this Court for a writ of certiorari, was entered on September 13, 1974. The petition for a writ of certiorari was filed October 15, 1974[2] and granted on December 16, 1974.[3] The jurisdiction of this Court rests on 28 USC 1254(1).

QUESTION PRESENTED

Whether in construing the remedial provisions of Title VII of the Civil Rights Act of 1964, the court of appeals, in reviewing a district court's decision and decree, has power to order the trial judge—in this and virtually all other cases henceforth—to award "back pay" as a matter of course to complainants whenever unlawful employment practices are enjoined, despite the Congressional intendment as set forth in § 706(g)

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[1] The highly unconventional course of the antecedent proceedings is detailed in our Statement (*infra*, pp. 12-14), involving as it does the convening of a rehearing in banc which was aborted after oral argument but prior to the issuance of a decision. In view of the subsequent resolution by this Court on June 17, 1974, of a question of judicial administration critical to the granting of the in banc rehearing, certified pursuant to 28 USC 1245(3) (*Moody* v. *Albemarle Paper Co.*, — U.S. —, 41 L.Ed. 358, 91 S.Ct. —), the court of appeals on July 22, 1974 retroactively "denied" the petitions for rehearing and suggestions for rehearing in banc, one of which had been filed by Petitioner herein, and, by the same token, "rescinded" its order for the rehearing in banc, which had been entered July 25, 1973 (A. 548).

[2] October 13, 1974 was a Sunday, while October 14, 1974, fell upon Columbus Day, a national holiday.

[3] The Court, on December 16, 1974, also granted the petition for a writ of certiorari in No. 74-389, filed on behalf of the Albemarle Paper Company and its related corporate entities, and ordered the two cases consolidated.

thereof, that the district court in its discretion, after a trial *de novo,* "may . . . order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ."

STATUTES INVOLVED

The pertinent provisions of Sections 701(b), 703(a), 703(c), 703(h), 705(a), 706(a), 706(e), 706(f), 706(g), 706(k), and 716(a), Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 USC § 2000e *et seq.;* and 706(g), Title VII Civil Rights Act of 1964, as amended by Public Law 92-261, approved March 24, 1972, 42 USC § 2000e-5(g) are set forth in the Appendix, *infra,* pp. 1a-4a.

STATEMENT

A. The Proceedings in the District Court and Court of Appeals Prior to the In Banc Rehearing (August, 1966—February, 1973)

In November, 1971, the district court concluded, in a suit instituted initially in August, 1966 by four employees against the Albemarle Paper Company (hereinafter, the Company) and Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO [4] (the Union, Petitioner herein) under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, et seq.), that the seniority system of the Company, governing promotions and demotions of employees at its Roanoke Rapids, North Carolina plant, operated to continue the effects

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[4] The parent International Union—United Papermakers and Paperworkers, AFL-CIO, CLC—while also named as a party defendant in the Complaint (A. I, 50-51) had not been named in the charge previously filed with the Equal Employment Opportunity Commission, and hence, as a jurisdictional matter, was removed as a party defendant by court order of July 6, 1967, dismissing the action with respect to the International (A. 16-20). This ruling was not contested.

of past discrimination, and ordered it restructured—with the substitution of plant for job seniority as the touchstone.

The district court denied the request for an award of back pay to the class (the suit having in the interim been designated a class action), on multiple grounds, including corrective action that had been taken over the years as well as prejudice to the employer and union defendants resulting from the belated assertion of the monetary claim several years after institution of the action, reversing an earlier and long-standing disclaimer on this score. (A. 498, 502). The trial court also held that the Company had sustained its burden of proving that its pre-employment personnel testing procedures had undergone requisite validation and were job related, hence non-discriminatory.

The trial of two weeks duration was recessed on August 2, 1971, as it neared completion, so that District Judge Dupree—to whose docket the case had been transferred a few months earlier [5]—could utilize the occasion for an on-the-site inspection of the Company's plant in operation, in the presence of counsel for the opposing litigants (A. 493-494).

Following is a resume of the general pattern of plant operations and employment practices, as reflected by the record before the trial court, insofar as material to the question presented in the case at bar.

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[5] Judge Dupree, confronted with a massive case file resulting from the preceding years of discovery, took a number of incisive steps to move the case to trial as expeditiously as possible "consistent with the rights of all parties to a full and fair hearing".

Plant modernization

While the Kraft paper mill has been in operation since 1907, it was not until the 1950's that expansion and modernization of the Company's facilities went forward progressively, including the assimilation of such features as a modern pulp mill and paper machines, followed later by the installation of a modern power plant and other advances in the industry of a highly sophisticated and technically complex nature (A. 346).

A basic factor complicating the Company's problems of recruiting plant production personnel was the greatly expanded production capacity that resulted from the installation of this machinery and equipment valued at several million dollars (A. 346). It was at this point, also, that the "technology of the pulp and paper industry . . . was moving ahead as rapidly as within any 5 or 6 year history of the industry . . . in terms of equipment and in terms of jobs . . .", with computers used extensively through the production process (A. 346). The contrast was drawn between a paper machine producing 10 or 15 tons a day—a small slow-moving installation—and a machine of the modern technology "moving at speeds of 1,500-1,850 feet a minute" for whose operation "a man can no longer depend on his eyesight, on his feel for the job, but he rather must rely on . . . sophisticated technical pieces of equipment" (A. 347).

For the special skills required, the Company resorted to country-wide recruitment, and concurrently sought to utilize those presently employed at the mill, through special training programs, job transfers, and other techniques, since there was no local labor market from which to draw trained pulp and paper mill employees (A. 195, 348).

By way of illustration, the Union cooperated with the Company in the establishment by agreement of a formalized training program for maintenance employees; launched in 1959, the project was known as the Maintenance Apprenticeship Program (A. 105). Company representatives sought to enroll incumbent black employees in the program through personnel solicitation, advertising and personal letters or memos, with a waiver of the then high school education requirement for those found otherwise qualified (A. 105-106).

Seniority practices and their evolution

Throughout the modernization period, certain production and maintenance employees at the plant were covered by collective bargaining agreements, negotiated on their behalf by the Union (A. 87-88). Approximately, 637 persons were employed in production and maintenance jobs (as of mid-1967), of whom about 517 were white and 120 black (A. 87).

As is the standard practice in this industry, operations were conducted on a departmental basis, with the skills and "know-how" in each, not necessarily or readily transposable. Within a given department, when ability was "relatively equal", job seniority was basically the controlling factor for determining promotion and demotion under this system, as comporting with the needs of the industry for requisite on-the-job training of employees at each progressive level (A. 88-89, 95, 193-196).

Accordingly, the collective bargaining agreement provided for several "lines of progression" in which groups of jobs are segmented on a functionally related basis, so that ordinarily experience in one serves as training for the next higher and more complex job in that particular progression line, with the lowest pay at

the bottom and the highest pay at the top of the line (A. 95-96). Thus when a vacancy occurred in a given progression line, the qualified incumbent[6] in the job classification immediately below, who had the greatest length of service at the lower job level, would normally be accorded the first opportunity for the promotion, notwithstanding that other fellow employees in his same job classification had served longer in the department itself or in the plant (A. 96).

Supplementing the progression lines were labor pools for newly hired employees known as the "Extra Boards" or "Call Boards", to which an employee who was demoted due to a reduction in force in a progression line would also revert to await recall (A. 104). This reservoir of employees was used to staff the bottom or entry jobs as they became available in the lines of progression (A. 104).

The various lines of progression were formalized in the mid-1950's; and prior to 1964, certain skilled jobs at the mill and the corresponding lines of progression were for white employees; the other jobs were restricted to black employees in separate lines of progression (A. 88-89). Requests of employees for transfer from one line of progression or department to another line of progression or department were then granted at the sole discretion of the Company; only if the transfer were effected at the Company's request, did the employee retain for a substantial period, the seniority rights of his former status (A. 96-97).

However, under the provisions of the collective bargaining agreement negotiated in 1968, the transferred

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[6] Assuming, "that the person has the necessary ability, experience and training to do the higher job" (A. 96).

employee was protected in his mobility by the benefit of his former rate of pay, in the event it were higher than that of the new job he assumed, a feature referred to in the industry as "red circling" (A. 98). In addition to the "red circling" or rate retention rights afforded transferees under the 1968-1971 labor contract, major changes were made in the merger and intermeshing of formerly segregated progression lines, thereby removing racial restrictions (A. 90, 97-98, 249). The Union's role was substantial in helping to bring about these changes (A. 98-99).

The scope and limitations of the Union's further efforts to effect corrective action

Against this background, the Union had proposed, during the negotiations leading to the 1965-1968 labor agreement with the Company, that a combination of plant and departmental seniority should thereafter determine promotion and demotion within lines of progression, thus eliminating within each department, the *de facto* segregation which then characterized the separate lines of progression (A. 133). This proposal was rejected by the Company representative (A. 134, 250, 255-256).

In the course of these negotiations the Union also proposed, that incumbent black employees be permitted to transfer from the extra boards (containing the employee reserve), or from their lines of progression, into all other lines of progression without being required to satisfy the same prerequisites as outside applicants; *i.e.,* the completion of a high school education and a series of tests (A. 135, 139). This proposal likewise met with rejection, whereupon the Union decided not to elevate either unsuccessful proposal to the status of a strike issue, but to accept the Company's counter-proposals instead (A. 133-134, 146).

In the bargaining negotiations leading to the 1968 labor agreement, the Union made proposals, which, if accepted, would have resulted in the sweeping substitution of plant seniority for job seniority as the controlling factor in promotions, demotions, transfers and layoffs (A. 98-99, 135);[7] upon their rejection, again the membership of the Union voted to accept the Company's more limited counter-proposal as part of a final offer and not to stand upon its original proposals as strike issues (A. 135, 259-260).

With respect to employee qualifications and the "testing" issue, the Union's course of conduct throughout this case was conditioned by the fact that the Company's hiring practices were established unilaterally, without consulting the Union's officers or representatives as to hiring policy or the qualifications required of an application (A. 139, 143, 145, 251). Nor was the subject of testing included in the labor agreement.[8] Moreover, the representatives of the Union were aware that it would be improper to seek any measure of control over hiring practices, in view of the so-called "right-to-work" state statute in North Carolina. (A. 145).

Additionally, the Company reserved to itself the right to make a final decision as to an employee's qualifications for promotions, demotion and transfer (A. 251). Indeed, during the 1968 contract negotiations, the

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[7] The Union's proposal was that promotions or transfers go to "the senior qualified employee" and that in "the event of layoff, any qualified employee may exercise his plant seniority to any bottom level job" (A. 98-99).

[8] Notwithstanding, on one occasion when the Company at first deemed two boiler room employees as lacking the necessary qualifications for employment in the new power plant, installed in 1965, the management was persuaded by the Union to utilize them as helpers there, after they had passed a specially designed test and were given further training (A. 235).

Union failed in its effort to include a provision requiring the Company to post notices of job vacancies as they occurred (A. 262).

Less than twenty employees testified either at the trial or by deposition, as representative of the "affected class" in the action; most were barely literate and, on the average, had less than four years of formal education. The Union sponsored classes at the union hall, where a number in this category first learned to read and write or to improve their rudimentary skills (A. 128-129, 131, 151-153, 155, 166). Insofar as the ability to maintain such facilities was concerned, the Union's assets were less than twenty thousand dollars, derived from membership dues of five dollars per month (A. 271).

The individual members of the class, whose testimony is of record, failed, however, to show that they were actually qualified to move up to existing vacancies and could have filled them; some expressed a disinclination to leave their present jobs (A. 131).

The District Court's opinion and order

The district court's findings of fact encompasses a comprehensive review of the Company's seniority system, past and present; upon concluding that it still operated to continue the effects of past discrimination, which had not been eradicated, the trial judge ordered the substitution of a plant-wide seniority system for promotion and demotion when employees of the "affected class are competing with employees not of the affected class and the qualifications of the competitors are relatively equal" (A. 499-500).[9]

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[9] In this connection, job residency requirements were ordered also, "based upon minimum tenure required to gain the skill and proficiency" necessary (A. 496-497).

In approaching the issue of back pay, the trial judge adverted to the controlling language of statute, 42 USC § 706(g), noted that it provides "that the court '*may* . . . order such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay*' " (his italics), and concluded that the "statute thus speaks clearly in terms of the discretionary power of the court" (A. 497).

On this basis, the trial judge denied the request for back pay stating in part:

> "It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprenticeship Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in *Robinson,* supra [*Robinson* v. *Lorillard,* 444 F.2d 791 (4th Cir. 1971], the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albermarle has consistently paid higher wages at all levels of employment than those paid by other industries in the area—doubtless a reflection of the sophistication of the industry" (A. 498).

An additional "equitable" factor cited by the district court on this score, was the prejudice resulting from the belated assertion of the back pay claim, several years after the initial disclaimer that any such relief was being sought (A. 498).[10]

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[10] As the trial judge noted the claim for back pay was "not prayed for in the pleadings" (A. 498); beyond this, it was specifically disavowed during the first three and a half years that the discovery process went forward (Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, November 22, 1966 (A. 13-14).

Review and reversal by the Court of Appeals

On appeal of the testing and back pay rulings, a majority of the court below, on February 20, 1973, reversed the district court on both issues. Designated and assigned to the three-judge division which heard the case, were the court's two retired or senior judges, along with Judge Craven, who is in regular and active service. A different senior judge joined Judge Craven to constitute a majority for reversal and remand on each ground of appeal—and correspondingly, a different senior judge dissented on each of the two issues.[11] With respect to the question of back pay, separate opinions were filed by each of the three judges, with the majority and dissenting opinions differing sharply on the principles of law and statutory construction that should govern review of the exercise of discretion vested in the trial judge under the statute. (A. 520-524, 524-532, 536-537).

B. The Convening of the In Banc Rehearing before a Nine-Judge Bench and Its Aftermath

The Union, on March 6, 1973, filed a petition for rehearing with suggestion for rehearing in banc, solely on the back pay issue, as did the Company, but with respect to both the back pay and job testing issues.[12] The Union contended in its petition that the majority opinions on the back pay question introduced entirely novel

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[11] Thus (1) on the testing procedures issue, Judge Craven and Senior Judge Boreman were in the majority, with Senior Judge Bryan dissenting, while (2) on the back pay issue, Judge Craven and Senior Judge Bryan formed the majority, with Senior Judge Boreman dissenting.

[12] As we have indicated (*supra*, p. 9), the Union took no part in the argument on the testing issue, essentially a management prerogative outside the scope of conventional collective bargaining.

concepts in judicial interpretation and enforcement of the relevant statutory provisions, with a resultant holding that marked a wide departure from the settled principles theretofore endorsed by the court below and the other circuit courts of appeals; it urged further that the majority opinions, for all practical purposes, precluded the trial court, in this and all other such potential suits generated at the district court level, from exercising any degree of discretion on the remedial issue of back pay awards, and—contrary to the statutory concept—placed back pay on a virtually mandatory basis.

On June 25, 1973, the court below entered an order granting the petitions for rehearing in banc, with the statement that "a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original panel, have voted to grant the petitions." Following the filing of supplemental briefs, all parties participated in oral argument at the in banc rehearing convened on October 2, 1973, with the bench composed of the seven active and two senior judges of the court below. However, a decision was never finally issued, notwithstanding a "tentative vote" to "modify the panel decision with respect to an award of back pay" (A. 540).

This Court held, the question having been submitted in the interim by certificate of the court below pursuant to 28 USC § 1254(3),[13] that "senior circuit judges who

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[13] As summarized by this Court: "It had been the practice of the Fourth Circuit to count the votes of their senior judges who were members of the original hearing division when the court acted on the question whether to order a rehearing in banc. In those cases, however, the votes of the senior judges were not crucial. Certificate, at 3. [A. 543] Here, their votes are crucial. In Moody, while a 'majority of the circuit judges of the circuit who are in regular active service' did not vote for a

are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc". *Moody* v. *Albemarle Paper Co.*, — U.S. — 41 L.Ed. 358, 360, 362, 94 S.Ct.—(June 17, 1974).

In deference to this Court's decision, the court below, on July 22, 1974, declared that its order entered a year earlier "setting this case for rehearing in banc" was currently "rescinded" as "improvidently entered", and the initial "petitions for rehearing and rehearing in banc" were "denied" (A. 548). Thus the initial decision and judgment of the three-judge panel were reinstated.[14]

C. The Initial Panel Decision on Back Pay to Which the Court of Appeals Reverted

The divided three-judge panel of the court of appeals, reversing the district court's discretionary refusal to award back pay, held that "a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act, should ordinarily be awarded back pay unless special circumstances would

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rehearing in banc, the two senior judges who sat on the division by designation did so vote; their votes, if counted, would make a majority for rehearing . . . . Accordingly, all Circuit judges of the Fourth Circuit in regular active service and both senior judges of the Circuit have . . . certified to us the question whether a senior judge of the circuit who was a member of the original division hearing a case may vote to determine whether the case should be reheard in banc." *Moody* v. *Albemarle Paper Co., supra,* 41 L.Ed. at 360.

[14] Upon motion filed by both the Company and the Union, the court of appeals recalled its judgment (issued in lieu of mandate) and granted a stay of mandate not to exceed thirty days from September 13, 1974, pending the filing of petitions for a writ of certiorari. *Cf.*, Federal Rules of Appellate Procedure, 28 USC Rule 41(b).

render such an award unjust" (A. 523-524; footnote omitted). This new back pay doctrine was premised in essential part on the view that "a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorneys' fees under Title II of the Civil Rights Act"; thus, the majority concluded that either "are to be awarded as of course in the absence of 'special circumstances' " (A. 525). In the majority view, the district court "must exercise its discretion to this end in awarding back pay because of its "compensatory nature" and the "strong congressional policy embodied in Title VII" (A. 523). The rarity of the "special circumstances" that would be required to obviate a back pay award was illustrated by the example put forward of the legal necessity of complying with state protective legislation, such as that limiting the hours of work for female drivers, as a defense against charges of employment discrimination.[15]

"Strenuous objections" to the foregoing rationale were raised by the dissenting judge, who pointed to "the fallacy" of equating the granting of attorneys' fees under Title II of the Civil Rights Act of 1964 [in accordance with *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968)], with back pay under Title VII of the Act (A. 525). In concluding that "the award of back pay, unlike the grant of attorneys' fees, is an element

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[15] The majority stated: "For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 702, 610-11 (E.D. La. 1971), *aff'd, per curiam,* 460 F.2d 1228 (5th Cir. 1972)" (A. 524). In the *Schaeffer* case such a factor was held exculpatory until the statute relied upon was declared invalid. The *LeBlanc* case, *supra,* presented a closely analogous situation.

of affirmative relief which has been entrusted to the more general discretion of the district courts", the dissenting opinion emphasized the significance of two factors: (1) that "the congressional separation of these two provisions indicated an intent to treat them independently"; and (2) that while back pay is among "the equitable remedies which the district court may use in fashioning relief", there is no evidence of "congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies" (A. 526; footnote omitted).

The dissenting opinion further stressed the impropriety of overriding the "equitable balancing power" vested by statute in the district court, which is charged "with the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case"—a function "properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal" (A. 527-528; footnote omitted).

SUMMARY OF ARGUMENT

The majority opinion and ruling of the court of appeals is at odds with the plain language and Congressional intent expressed in Section 706(g), Title VII of the Civil Rights Act of 1964. That section invokes the traditional equity powers of the district court, as confirmed by landmark cases decided by this Court, and specifies that the trial court may award or decline to award back pay to complainants on a discretionary basis. The ruling below, however, requires that back pay be awarded on a mandatory basis (in the absence of rarely encountered "special circumstances") in the

event the district court finds and enjoins unfair employment practices under Title VII of the Act.

The court of appeals by its ruling, which constitutes a turnabout from uniform judicial precedent previously established in cases arising under Title VII, has thereby overreached its review function and undercut the exercise of discretion reserved to the district court. The appropriate test on review is whether this discretion has been exercised in an arbitrary or willful manner, or rather with an eye to what is right and equitable under the circumstances. The dissenting opinion correctly states that the "term 'discretion' denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal."

Beyond this, the court below, by placing a premium on litigation for monetary recovery, has upset the equilibrium of Title VII of the Act, which places primary reliance on the conciliation process for securing compliance and effectuating the legislative policies.

ARGUMENT

Introduction

The decision below is highly vulnerable on two grounds: (1) the court of appeals' unwarranted intrusion into the forbidden area preempted by the legislative authority of the Congress; and (2) improper interference with the exercise of traditional equity powers vested in the Federal district courts and specifically invoked by the plain language and import of the controlling statutory provision. Respondents' basic con-

tentions in support of the decision below are similiarly flawed as we shall show.[16]

While this Court has previously decided a series of cases arising under Title VII of the Civil Rights Act of 1964 (hereinafter the Act), presenting limited issues of a procedural or substantive nature,[17] the case at bar is the first of such dimensions as to invite an examination of whether the court of appeals has overreached its review function vis-a-vis the district court and has breached the doctrine of separation of powers by seeking to substitute judicial for legislative judgment.

The holding below on its face contravenes an elementary and time-honored canon of statutory construction; where the language of a statute, as here, is couched in plain and unambiguous language, it must be given effect according to its plain and obvious meaning.[18] The legislative command to the district court as expressed in Section 706(g) of the Act, is that upon enjoining unfair labor practices, it "may order such affirmative action as may be appropriate" and that such remedial measures "may include reinstate-

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[16] We believe this is true also of the views advanced by the Equal Employment Opportunity Commission together with a division of the United States Department of Justice, on whose behalf briefs *amici curiae* and oral argument, were presented below (see, *infra*, p. 27, fn. 30).

[17] E.g.: *Love* v. *Pullman Co.*, 404 U.S. 522 (1972) (prior oral referral to a state agency by the EEOC); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (whether a "demonstrable relationship" exists between scores obtained by testing and actual job performance); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (whether a prior arbitration award is a bar to Title VII action).

[18] E.g.: *Hilton* v. *Sullivan*, 334 U.S. 323 (1948); *U.S.* v. *Sullivan*, *332* U.S. 689 (1948); *Ex parte Collett, Ill. & Ky.*, 337 U.S. 55 (1949); *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 (1947).

ment or hiring of employees, with or without back pay".

How then, it may be asked, can the majority below read and construe this language to mean that when an injunction issues, back pay "should ordinarily be awarded" concomitantly—except in rarely encountered special circumstances. The question is all the more trenchant since the common denominator of the prior decisions, including those in the circuit below, was—as stated by this Court as recently as February, 1974—that in "Title VII cases the Courts of Appeals have characterized back pay as an integral part of an equitable remedy . . . and have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge". *Curtis* v. *Loether,* 415 U.S. 189, 197 (1974).

Illustrative of this Court's evaluation is a typical statement by a court of appeals that "this language [of Section 706(g), *supra*] leaves the award or denial of back pay to the discretion of the district court, to be exercised in the light of all the circumstances of each case". *Kober* v. *Westinghouse Electric Corp.,* 480 F.2d 240, 246-247 (3rd Cir., 1973).

If more were needed, the legislative history on this score is incisive and unequivocal, and in direct confirmation of what the statutory language, as initially understood by the courts, already makes clear. Thus, while the original version of the bill in the House of Representatives provided for mandatory affirmative relief (H.R. 7152), this provision was reversed in the Senate (Amendment No. 656). As Senator Dirksen explained: [19]

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[19] 110th Cong. Rec. 12381-85 (June 5, 1964).

> "The mandatory requirement for affirmative action, including reinstatement and back pay, upon a finding of violation, has been revised to read '*may* . . . order such affirmative action as may be appropriate, which *may* include reinstatement and back pay' ". (Emphasis added.)

Further illumination of the Congressional intent with respect to the question at hand is provided by reference to the 1972 Amendments to Title VII of the Act.[20] Over seven years after enactment, the original discretionary pattern of Section 706(g) was etched even more sharply by adding to the "affirmative action" feature pinpointed above by Senator Dirksen (*viz,* "such affirmative action as may be appropriate"), the option of "any other equitable relief as the court deems appropriate" [21]—in addition to the specific options of "reinstatement or hiring of employees, with or without back pay" previously designated in the original 1964 enactment. Thus Congress further strengthened the hand of the district court to tailor its decree to the requirements of the particular case.

Nevertheless, the court below, almost a year after the 1972 amendments were approved, moved in the opposite direction to adopt an inflexible position with respect to this key remedial provision—reintroducing a mandatory element which the Congress had rejected both in 1972, and earlier in 1964. To rule, as did the majority below, that "a district court must exercise its discretion as to back pay . . . under Title VII of the Act", so that it "should ordinarily be awarded" along

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[20] The Equal Employment Opportunity Act of 1972, Public Law 92-961, approved March 24, 1972.

[21] Appendix, *infra*, p. 4a.

with injunctive relief, is not only to state a contradiction in terms but to strip the term "discretion" of any real meaning, notwithstanding its importance as a basic concept in jurisprudence.

In so doing, the majority below abruptly turned away from the prevailing judicial precedent in cases arising under Title VII of the Act, seriously overreached the "function of the court of appeals"; that "is to review the relief the district court grants in the light of the findings and supporting record and determine if there has been an abuse of discretion,[22] but not to "substitute its discretion for that of the district court".[23] By the same token, the holding of the court below constituted "an intrusion into the legislative field", contrary to the "mandate of the Congress" which is expressed in statutory language that "is clear and specific". *Schnell* v. *Eckrich & Sons,* 365 U.S. 260, 262-263 (1961).[24]

I

The Mandatory Back Pay Ruling Below Impairs the Exercise of Discretion and Equity Jurisdiction Vested in the District Court

Before the advent of the decision below, the earlier standard of review to which the court of appeals subscribed was stated in the following terms:

> "The fashioning of effective and appropriate relief depends in part on the discretion of the district court. The function of the court of appeals is to review the relief which the district court grants in

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[22] *United States* v. *Dillon Supply Co.*, 429 F.2d 800, 804 (4th Cir., 1970).

[23] *Larson* v. *United States*, 296 F.2d 167, 170 (8th Cir., 1961).

[24] See also, e.g.: *Ebert* v. *Poston*, 266 U.S. 547; *Louisville and National Railroad Company* v. *Mottley*, 219 U.S. 466.

> light of findings and the supporting record and to determine if there has been an abuse of discretion". *United States* v. *Dillon Supply Co.*, 429 F.2d 800, 804 (4th Cir., 1970).

The majority below, in reversing the trial judge's discretionary refusal to award back pay, conceived an entirely new and contrasting formula, which, in the last analysis, leaves the district court with no choice but to accompany injunctive relief with an award of back pay to forestall reversal (absent "special circumstances," as noted above).[25]

The ruling, it should be noted in passing, is adapted almost word for word from that announced by this Court to govern the assessment of an attorney's fee in suits under Title II of the Act (barring discrimination in places of public accommodation). In *Newman* v. *Piggie Park Enterprises,* 300 U.S. 400,402, the Court concluded:

> "A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority [footnote omitted] .... *It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.*" (Italics supplied.)

The dissenting opinion below, as we have indicated, stresses the fallacy of equating grants of attorney fees

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[25] Some of the other courts of appeals subsequently followed this lead. E.g.: *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 252-53, (5th Cir., 1974); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973).

in Title II suits with back pay awards under Title VII of the Act. This formidable objection aside, what are the consequences of ignoring the provisions in Section 706(g), *supra,* which "characterized back pay as an integral part of an equitable remedy" calling into full play the equity powers of the district court, with the "decision whether to award back pay committed to the discretion of the trial judge"? (*Curtis* v. *Loether, supra,* 415 U.S. at 197). The short answer, we submit, is that the court of appeals cannot do without committing fatal error.

As this Court stated in *Hecht Company* v. *Bowles,* 321 U.S. 321, 329-330:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

The opinions of the Court, particularly those which have come to be recognized as landmarks in the development and application of this doctrine, are replete with expressions of a similar nature. They are familiar to the Court and it is not necessary to repeat them here *in extenso;* a few examples will suffice.

The Court has over the years reiterated the principle that a court of equity is not inflexibly bound to direct any particular form of relief; rather, it has full power to grant or withhold the particular relief sought by fashioning a remedy which will best serve the ends of justice in the particular circumstances. In *Lemon* v.

Kurtzman, 411 U.S. 192, 199, 200 (1973) Chief Justice Berger said:

> "But however we state the issue, the fact remains that we are asked to reexamine the District Court's evaluation of the proper means of implementing an equitable decree. (citation omitted). In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 27 n 10, 28 L.Ed.2d 554, 91 S. Ct. 1267 (1971)."

See also: *Mills* v. *Electric Auto Light Company,* 396 U.S. 375 (1970); *Gilbertville Trucking Company, Inc.* v. *United States,* 371 U.S. 115, 130 (1962); *United States of America* v. *W. T. Grant Company,* 345 U.S. 629, 632 (1953); *Burns* v. *United States,* 287 U.S. 216, 222-223 (1932); *Lagnes* v. *Green,* 282 U.S. 540, 541 (1931).

The full significance of the foregoing judicial authority for this branch of our argument may be more readily appreciated by again turning briefly to the legislative history of the Act, including that of the 1972 Amendments. A key figure in the passage of the entire 1964 Act, Congressman McCullough, explained the changes resulting in the sharp delineation of authority as between the Equal Employment Opportunity Commission and the Federal judiciary:

> "As the title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal

judiciary." H. Rep. No. 914, Part 2, 88th Cong., 1st Session (1963).[26]

Thus Congress made a clear-cut choice[27] to which it steadfastly adhered, notwithstanding that a bill was being introduced in every session since the Act was passed in 1964, and was the subject of particularly sharp controversy in the debate of the 1972 Amendments,[28] to give the Equal Employment Opportunity Commission decisional and cease-and-desist enforcement powers like that of the National Labor Relations Board, subject only to limited review in the Federal Circuit Courts of Appeals.

In the course of drafting and enacting the 1972 Amendments, Congress considered the back pay provision but amended it only by including a provision that back pay shall not accrue from a date more than two years prior to the filing of a charge (Appendix, *infra*, p. 4a). Congress may also be presumed to have been aware of the state of the pre-1972 decided cases (*supra*, pp. 19, 21). Under these circumstances, the inference is irresistible that it was because Congress approved the approach which the majority below has since abandoned, that it reinacted the Section 706(g), *supra*, in-

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[26] Congressman McCullough was ranking minority member of the House Judiciary Committee.

[27] When that legislative body chooses to provide a remedy for infringement of Congressionally established rights, it has the alternative of providing only an administrative remedy, a judicial remedy subject to exhaustion of administrative remedies, an option of either administrative or judicial remedies, or only judicial remedies. *Tatum* v. *United States*, 270 U.S. 568, 576-77 (1925); *Curtis* v. *Loether*, *supra*.

[28] The Equal Employment Opportunity Act of 1972, Bureau of National Affairs, pp. 162 ff. (1973).

cluding the back pay provision, without material change.

In the foregoing frame of reference, there would appear to be little support in law or logic for respondents' position below, which will apparently be renewed in this forum, that "Title VII's remedial scope cannot be abandoned to the varying and inconsistent interpretations of hundreds of district judges" (Brief below, pp. 40-41), or to their "essentially standardless and unfettered discretion", thus inviting "arbitrary or willful decisions" (p. 9, Brief of Respondents In Opposition to Petitions for Certiorari in Nos. 74-428, 74-389).

While this is not essential to our argument since the Congress has spoken, respondents' pessimistic evaluation of the district courts' standard of performance in Title VII cases, does not comport with that of objective observers, who report that these courts "have not been reluctant to order a broad spectrum of affirmative action, including an extensive revamping of established seniority and referral systems", and that their decrees reflect "innovative affirmative action requirements in the context of both industrial and craft union situations.[29]

Moreover, the Federal district court bench has for many years been engaged in fashioning remedies for infringement of legal rights in a variety of complex fields, so that the ramifications of Title VII actions are hardly so exceptional as to strain its capacity. Surely, the dissatisfied litigant in an antitrust suit, for example, would be given short shrift in complaining that the district courts should not be entrusted with the task of

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[29] Section of: Labor Relations Law, American Bar Association, 1971 Committee Reports, Volume II, p. 63.

drafting effective remedial decrees to curb restraint of trade or monopolistic practices found unlawful. Nor do we find in Article III of the Constitution or any of the applicable statutes, any suggestion of incompetency requiring that the district courts' normal function be truncated or inhibited in cases involving a particular variety of legislation such as that now before the Court.[30]

We think it obvious that respondents' phrase, "unfettered discretion," is a rhetorical device that has no place or meaning in the legal lexicon. The discretionary award or refusal to award back pay, of course, calls for the reasoned and conscientious judgment of the trial court—a discretion exercised not arbitrarily or willfully—that is traditionally measurable

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[30] The foregoing comments are applicable as well to the contentions urged below on behalf of the Equal Employment Opportunity Commission (Brief below, *amicus curiae*, pp. 33-40) emphasizing the contrary manner in which the Commission would have resolved this aspect of the case, were that agency vested with the discretionary authority, it seeks to minimize when exercised by the district court. There is equally little merit in the related position asserted at the rehearing in banc (Brief For The United States and The Equal Employment Opportunity Commission As Amicus Curiae, p. 22, fn. 6):

> "The discretion which can be exercised by administrative agencies while limited, is of course, broader than the discretion which can be exercised by a trial court in a Title VII suit. . . . A trial court has none of the expertise of an administrative agency; its discretion is therefore narrower and the scope of judicial review consequently more searching."

The conclusion drawn above is, we think, indefensible. Moreover, judicial notice may be taken of the fact that the past years have witnessed a searching reexamination of the administrative agency as an institution, including a diagnosis of its many ills. It is, therefore, unrealistic at this late date to idealize the administrative agency technique. In any event, the choice was for the Congress to make and that choice has been made.

and reviewable by the court of appeals. Indeed, as this Court declared long ago the "question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion". *Burns* v. *United States, supra,* 287 U.S. at 222-223.

Judicial judgment in fashioning a remedial order according "to what is right and equitable under the circumstances" (*Lagnes* v. *Green, supra,* 282 U.S. at 541), should be permitted here, as under the National Labor Relations Act from which the back pay concept was derived,[31] so that the trial court may avail "itself of the freedom given it by Congress to attain just results in diverse, complicated situations"—including or excluding back pay, which is not "mechanically compelled by the Act" (*Phelps Dodge* v. *N.L.R.B.,* 313 U.S. 177, 198 (1941).

Finally, we submit that if ever a case dramatized the need to return to the accepted standard of review traced above, rather than the preemptory rule announced by the majority below, it is this one. Commenced in mid-

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[31] See, e.g.: Legis. Hist. Titles VII and XI of Civil Act of 1964, at 3015, 3039, 3041 (EEOC, undated). Indeed, historically "back pay." and reinstatement had been tools available to the National War Labor Board in 1918, the National Labor Relations Board acting under Section 7(a) of the National Industrial Recovery Act, and also the only court faced with remedying a discharge in violation of an injunction issued under the Railroad Labor Act. *Matter of Corn Products Refining Co.,* Docket No. 130, decided November 21, 1918, reported in U.S. Dept of Labor, Bureau of Labor Statistics, Bulletin No. 287 (Dec. 1921), National War Labor Board, pp. 183-184 (Gov't Printing Off., 1922); *Matter of Chicago Defender, Inc.,* 1 NLRB (old) 119, 122, decided October 20, 1934; *Brotherhood of Railway and S.S. Clerks* v. *Texas & N.O.R. Co.,* 24 F.2d 426, 434 (S.D. Tex.), affirmed 33 F.2d 13 (C.A. 5), affirmed, 281 U.S. 548.

1966 and pending in the district court for some five years, this case covers almost the entire time span since the effective date of Title VII of the Act under which it was brought. The development of the guiding principles for application of this novel legislation to the employment patterns of industrial enterprises and their progressive implementation by the courts went forward concurrently.

Perusal of the record before this Court will disclose an exemplary handling and mastery of the details of a case by the trial judge, who noted that it had "grown to almost unmanageable proportions" at the time it was assigned to him. The conduct of the trial itself, including a personal inspection of the Company's plant and the evenhanded treatment accorded the opposing parties, was in the best judicial tradition.

The trial judge has summarized the principle factors (*supra*, p. 11) upon which he relied for his discretionary refusal to award back pay.[32] The Company in its Brief has treated this aspect in full measure and we shall not burden the Court with a recapitulation here.

Speaking for the Union, we think that its overall conduct and serious efforts to meet the requirements of Title VII of the Act, at the critical turns of its bargaining negotiations with the Company, are fully compatible with the underlying equitable considerations that support the action of the district court in declining to order a monetary assessment. Noteworthy also in this connection was the Union's program to improve the literacy of some of its less well endowed members as well as other efforts to promote their job advancement.

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[32] Nor do we understand that the trial judge's opinion and order must articulate all of the factors on which his discretionary judicial action was based.

In the last analysis, as was well stated by the dissenting judge below: "The term 'discretion' denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal." (A. 527-528). Accord: *Kober* v. *Westinghouse Electric Co.*, 480 F.2d 240 (3d Cir. 1973). The result in question was providently reached and is an entirely equitable one.

It will be recalled that the trade union community and leadership had long been in the forefront, at the national level, of those advocating the passage of Title VII of the Act and earlier legislation of the same nature.[33] Beyond this, the Union here represents both white and black employees who must continue to work in harmony, side-by-side at the wheels of industry and in union affairs. At best, the difficulty in readjusting and accommodating diverse interests under the trial courts' decree, restructuring seniority, should not be underestimated. Where the relative rights of seniority are affected, it is axiomatic that improvement of one employee's status inevitably depreciates that of another.

Court decrees are not self-enforcing and require our sustained efforts. We doubt, however, that is was contemplated in any quarter, at the time the Act was adopted, that a local trade union that has conducted itself such as this one, would be required, no matter what the circumstances, to participate financially in under-

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[33] 110th Cong. Rec. 7205-7207 (1864); H.R. Report No. 1370, 87th Congress, 2nd Session (1962).

writing the effects of the social and economic imbalance of the past, which the Act was designed to eliminate.

II

Intrusion into the Legislative Sphere by the Court of Appeals

We suggest that another serious consequence of the decision below is that it marks an appreciable intrusion by the court of appeals into the legislative realm, with the substitution of judicial for legislative judgment in areas where Congress has affixed its own clear imprimatur with respect to Title VII of the Act.

In enacting Title VII and making it mandatory that the Equal Employment Opportunity Commission "*shall* endeavor to eliminate any such alleged employment practice by informal methods of conference, conciliation and persuasion" (Appendix, *infra,* p. 3a, Section 706(a), 42 USC 2000e(5)(b), (italics added)), Congress established a statutory scheme which seeks to utilize these techniques to the full in remedying employment discrimination.[34] The court decisions have uniformly implemented this legislative objective, and the 1972 Amendments to Title VII, carry forward a renewed faith by the Congress in the efficacy of this

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[34] As one student of the legislative history stated:

> "Congress apparently decided that the objectives of the Act could be better served by giving the informal measures of conciliation and persuasion a chance to work . . . . The conciliation process has several features which recommend it: it may solve problems without the animosities created by coercion; it gives the respondent a chance to explain and possibly justify his conduct before litigation receives widespread public attention; it is less expensive and time consuming than litigation; and broad relief is available . . ." 84 Harvard Law Review 1109, 1199-1200 (1971).

approach.[35] By virtually guaranteeing complainants under the Act, an award of back pay or differential pay, if discrimination is judicially determined under whatever circumstances, the majority opinion would place an undue premium on litigation, however protracted, in derogation of the conciliation feature of the Act.

In a recent case, for example, the United States Court of Appeals for the Eighth Circuit emphasized that "negotiation and voluntary compliance remain the primary mode of enforcement" of Title VII objectives, notwithstanding that the 1972 Amendments to the Act permit the Equal Employment Opportunity Commission to bring suit, after certain prerequisites have been satisfied. The court held that the Commission's failure to give the employer the required notice of imminent termination of conciliation efforts, barred the Commission's suit because—

> "Compliance with the regulation, a last gesture by the commission of a conciliatory attitude, may well give pause to the most recalcitrant employer. Faced with expensive and time-consuming litigation, the employer may be motivated to resolve the dispute in the congressionally preferred forum."

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[35] In introducing the conference report of House Resolution No. 1746, Representative Perkins stated:

> "Conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in federal distrct court to seek enforcement." Cong. Rec.—House, p. 1861 (March 8, 1972).

EEOC v. *Hickey-Mitchell,* 43 LW 2274 (8th Cir. December 11, 1974)

The ruling below, in our view has a double-edged effect. By virtually guaranteeing a monetary award along with injunctive relief, it shifts the center of gravity and balance of Title VII from conciliation to litigation, contrary to the Congressional design.[36] Beyond this, the compromise from mandatory to discretionary back pay that constituted an important legislative tactic—to help insure passage of the Act in the economic and social climate of the mid-1960's—has been nullified and the rejected mandatory approach reinstituted. This, we submit, works judicial mischief with the legislative process and is impermissible.

It should be added, that conciliation and settlement where feasible, is a welcome alternative to this and other trade unions, faced with the practical problems posed during the initial decade of Title VII on the national scene. Our aim is to make as rapid an adjustment as possible and get on with the main business of a trade union—employee representation in collective bargaining and allied matters—a goal long since an integral part of the nation's labor policy, the overall objectives of which must be preserved.

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[36] It is noteworthy that this may further tend to escalate the burgeoning caseload confronting the Federal court system, of which the Court is acutely aware.

CONCLUSION

For the reasons stated, we respectfully submit that the decision of the court of appeals should be reversed, with directions to affirm the order of the district court denying the request for an award of back pay.

Respectfully submitted,

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